Supreme Court United States.

OCTOBER TERM, 1878.

No. 46.

E. S. C. ROBERTSON, Plaintiff in Error,

vs.

HENRY CEASE, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. E. PAINE,
B. F. GRAFTON,
Of Counsel for Plaintiff in Error.

Thomas McGill & Co., Printers, Washington, D. C.

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STATEMENT.

The case is stated in the brief of John Hancock and C. S. West, attorneys for the plaintiff in error.

ARGUMENT.

I.

The circuit court had no jurisdiction of the cause when the judgment was rendered, because the record contained no averment that the defendant in error was a citizen of any state other than the state of Texas.

The precise words of the act of 1789 are these:

"The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or *the suit is between a citizen of the state where the suit is brought and a citizen of another state.*"

The supreme court has always construed this statute to require the citizenship of the parties to be *alleged in the record*. The decisions on this point are numerous, and are absolutely uniform. Emory *v.* Greenough, 3 Dall., 369; Bingham *v.* Cabot, 3 Dall., 382; Turner *v.* Enrille, 4 Dall., 7; Turner *v.* Bank, 4 Dall., 8; Course *v.* Stead, 4 Dall., 22; Abercrombie *v.* Dupuis, 1 Cr., 343; Wood *v.* Wagnon, 2 Cr., 9; Sullivan *v.* Steamboat Co., 6 Wheat., 450; Montalet *v.* Murray, 4 Cr., 46; Morgan *v.* Callender, 4 Cr., 370; Wallen *v.* Wlliiams, 7 Cr., 602; Cameron *v.* McRoberts, 3 Wheat., 591; Mollen *v.* Torrence, 9 Wheat., 537; Gassies *v.* Ballou, 6 Pet., 761; Breedlove *v.* Nicolet, 7 Pet., 429; Jackson *v.* Ashton, 8 Pet., 148; Bradstreet *v.* Thomas, 12 Pet., 59; Brown *v.* Keene, 8 Pet., 112; Evans *v.* Davenport, 4 McLean, 574; Case *v.* Clark, 6 Mas., 70.

But this rule, which requires an averment of citizenship in the record, having been established by the act as interpreted by the Supreme Court, it remains, of course, to consider whether the facts alleged in the record in a given case do or do not constitute a sufficient averment of the citizenship of the parties, and it has been necessary for the supreme court to pass upon such questions in several cases. While this court has decided that certain forms of statement which fall short of an *express allegation* of citizenship in the declaration, do satisfy the requirement of the statute, it has also decided, by a judgment which has not been overruled or questioned, that an averment of *residence* is not a sufficient showing of *citizenship* under the statute.

In Brown *v.* Keene, 8 Pet., 112, Mr. Chief Justice Marshall, delivering the unanimous opinion of the court, said:

"This appeal is from a decree of the court of the United States for the district of Louisiana. The first error assigned in the proceedings, is that the petition, which in the practice of Louisiana is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded, it is undoubtedly fatal.

"The petition avers that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland, and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. The petition, then, does not aver positively that the defendant is a citizen of the state of Louisiana, but, in the alternative, that he is a citizen *or a resident*. Consistently with this averment, he may be either.

"The additional words of description, 'having his fixed and permanent domicile in the parish of St. Charles,' do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicile; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments.

"The constitution extends the judicial power to 'controversies between citizens of different states;' and the judiciary act (1 Stats. at Large, 73) gives jurisdiction 'in suits between a citizen of the state where the suit is brought and a citizen of another state.'

"The decisions of this court require that the *averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.*"

In no case has this court ever held that a mere allegation of residence was a sufficient averment of citizenship.

In Parker *v.* Overman, 18 How., 141, this court said:

"In the petition to remove this case from the state court, there was not a proper averment as to the citizenship of the plaintiff in error. It is alleged that Parker resided in Tennessee and White in Maryland. 'Citizenship' and 'residence' are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the cause."

In Evans *v.* Davenport, 4 McLean, 574, the court held as follows:

"But there is an objection to this plea which has not been noted in the argument. It avers that the defendant

is a resident of New York. Now, the plea may be true, and yet the court have jurisdiction of the case. A citizen of Michigan may reside in New York for any length of time, and still maintain his citizenship in Michigan. A change of citizenship from one state to another is shown by the acts of the party. If he refrains from exercising the rights of a citizen in the state where he resides and claims to be a citizen of the state he left, he does not lose his citizenship in such state."

In the case of Express Co. *v.* Kountze, 8 Wall., 342, this court held that certain averments contained in the record in that particular case constituted a sufficient allegation of citizenship under the statute. The following is the language of the court:

"It is said if cases of a federal character were properly transferable to the circuit court, this was not one of them, because it does not appear that the suit was between citizens of different states. It is true, there is no direct averment to this effect, but it is the necessary consequence of the facts stated in the pleadings that the parties to the suit were citizens of different states. The averment that the plaintiffs were a firm of natural persons associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying that they had their domicile there. In this country, people usually live and have their citizenship in the place where they do business. Especially is this true of persons engaged in a business requiring capital and involving risk at a point which is remote from the great centers of trade and commerce."

In this case, it will be observed, the averment was not a mere averment of *residence*, as in the case now at bar. The averment was, that the plaintiffs had been engaged in the banking business at Omaha, Nebraska, for a period of eighteen months. And the reason given for holding this equivalent to an averment of citizenship is, that in this country people usually live and have their citizenship where they do their business, and especially those who engage in business requiring capital and involving risk at points re-

mote from the great centers of trade and commerce. It is obvious that this ruling cannot be interpreted as a decision that in general a mere averment that a party is engaged in trade at any designated place is tantamount to an averment of citizenship in the state wherein that place was situated. It cannot be construed as a decision, for example, that an averment that a party was at the time engaged in business in New York city, was equivalent to an averment that he was a citizen of the state of New York. On the contrary, it was only a decision that an averment that the plaintiffs had been engaged in the banking business eighteen months prior to 1864 at Omaha, was equivalent to an averment of citizenship in the state of Nebraska.

This is obvious, not only from the reasoning of the court, but also from the circumstance that the court made no attempt in the case of Express Company *v.* Kountze to overrule the case of Turner *v.* Bank, 4 Dall., 8, in which the court unanimously held that an averment that persons "used trade and merchandise in partnership together at a designated place," was not equivalent to an averment of citizenship.

The opinion was delivered by the chief justice, in these words:

"The action below was brought by the president and directors of the Bank of North America, who are all described to be citizens of Pennsylvania, against Turner and others, who are all described to be citizens of North Carolina, upon a promissory note made by the defendant, payable to Biddle & Co., and which, by assignment, became the property of the plaintiffs. Biddle & Co. are not otherwise described than as 'using trade and merchandise in partnership together' at Philadelphia or North Carolina. And judgment was for plaintiff. The error assigned, the only one insisted on, is that it does not appear from the record that Biddle & Co., the promisees, or any of them, are citizens of a state other than that of North Carolina, or aliens. * * But here the description given of the promisee only is that he 'used trade' at Philadelphia or North Carolina; which, *taking either place* for that where he used

trade, contains no averment that he was a citizen of a state other than that of North Carolina, or an alien; nor anything which by legal intendment can amount to such an averment. We must, therefore, say that there is error."

That the court, in Express Company *v.* Kountze, attached great importance to the geographical situation of Omaha, is very evident; for while it may be true that a *majority* of those persons who are engaged in banking business in such cities as New York, Chicago, Boston, St. Louis, and Cincinnati are citizens of the states to which those cities belong, still it is, at the same time, true that the persons engaged in such business in these large cities who are not citizens, nor even residents, of the states in which such cities are located, number many thousands. And if the court had concluded that the mere averment that a party was engaged in trade in the city of New York was equivalent to an averment that he was a citizen of the state of New York, or even a resident of that state, the conclusion would have been absurd; for not only do great numbers of persons engaged in trade in New York reside in that city, while citizens of distant states, but thousands engaged in trade there actually have their residence, as well as their citizenship, in Connecticut, New Jersey, and other states.

In Jones *v.* Andrews, 10 Wall., 327, the court held that an allegation of citizenship in the title of the bill and in the prayer was sufficient; that it was not necessary that the averment should appear at any particular place in the bill. This has no bearing upon the point now in question.

H. E. Paine,
B. F. Grafton,
Of Counsel for Plaintiff in Error.

UNITED STATES SUPREME COURT.

E. S. C. ROBERTSON

vs.

HENRY CEASE.

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P. PHILLIPS,
W. HALLETT PHILLIPS,
For Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

UNITED STATES SUPREME COURT.

E. S. C. ROBERTSON
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No. 46.

Brief of P. Phillips and W. Hallett Phillips, for Defendant in Error.

Cease brought suit in the circuit court of the United States on a promissory note executed by Robertson to one Chamblin, and claimed title thereto by virtue of its endorsement by his administrators, appointed in the State of Illinois, of which State Chamblin was a citizen.

In the petition the parties are thus described: "Henry Cease, plaintiff, who resides in the county of Mason and State of Illinois, against E. Sterling C. Robertson, defendant, who resides in the county of Bell and State of Texas." The petition contained no averment of the citizenship of the administrators.

The petition was subsequently amended by an averment that the administrators were citizens of Illinois, and Robertson, the defendant, was a citizen of Texas. p. 12.

The record does not disclose any amendment bettering

the discription of the plaintiff, Cease, though I have been furnished with the affidavit of Mr. Chandler, the attorney of the plaintiff, that he had obtained leave of the court to make the proper averment as to the citizenship of the plaintiff; that he prepared and filed it, showing the plaintiff to be a citizen of Illinois, and this has been mislaid.

I am aware that this affidavit forms no part of the record, but in case of reversal it may be used to give direction to the order which the court may make in the premises.

Addressing ourselves, then, to the record itself, let us see how the matter stands.

Our proposition is, that, though the citizenship must appear in order to enable the court to entertain jurisdiction, there is no sanctified form for the averment. It is sufficient that facts are shown to the court which give the jurisdiction, either expressly or by necessary legal intendment.

We are aware of the technical ruling of some of the earliest decisions, but, in effect, they have been overruled. In *Gassies* vs. *Ballon*, 6 Pet., 762, the Court say: "The authorities on this question have gone far enough; and the court is not disposed to narrow any more the limitations which have been imposed by the decided cases."

This said in a case where the averment describes the defendant as "a naturalized American citizen, residing in Baton Rouge;" and where it is held to be equivalent to an averment that he was a citizen of the State of Louisiana.

In the case of *Jackson* vs. *Ashton*, 8 Pet., 148, the defendant is described as "of Philadelphia." The Court, in denying the argument sustaining its sufficiency, say: "If this were a new question, the court might decide otherwise."

The description in this case was in the caption of the bill, and it was ruled that the caption could not be looked to for the citizenship. But in the case of *Jones* vs. *Andrews*, 10 Wall., 331, when this objection was urged at the

bar, the court overruled it, saying that, although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit.

The caption described the defendants as citizens of Tennessee, but the *body* of the bill they are styled "*residents* of Shelby County, in the State of Tennessee."

Reference is made by the court to the case of *Express Co.* vs. *Kountze*, 8 Wall., 342, in which the declaration described the plaintiff as "an association of persons carrying on the banking business in Omaha, Nebraska."

Here the argument against the sufficiency of the description is thus answered by the court: "It is said it does not appear that the suit was between citizens of different States. It is true there is no direct averment to this effect, but it is the necessary consequence *of the facts stated in the pleadings that the parties to the suit were citizens of different States.* The averment that the plaintiffs were a firm of natural persons associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying they had their domicile there. In this country people usually live and have their citizenship in the place where they do their business."

These two last decisions were concurred in by all the judges, and would seem to be wholly irreconcilable with the early rulings on this subject.

We are now concerned with the proposition submitted: that the citizenship need not appear in the declaration or bill if it is shown by other portions of the proceedings.

In *Railway Company* vs. *Ramsay*, 22 Wall., 326, is directly to this point. The Court say: "Where the jurisdiction depends upon the character of the parties, the facts upon which it rests must, of course, somewhere appear in the record. They need not, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record."

This decision is approvingly cited in *Bridges* vs. *Sperry*, 95 U. S., 403.

Now we reach the inquiry, Does it satisfactorily appear any where in the record that Cease was a citizen of the State of Illinois?

We shall see, in what follows, that this was never the subject of contention during the progress of the trial, but that his citizenship of Illinois was constantly admitted by defendant.

His right to bring this suit was denied by a special plea, which avers that the note was endorsed to him solely for the purpose of enabling him to sue in the Federal court, and in fraud of the jurisdiction; thus impliedly admitting the jurisdiction if the transfer was not colorable but *bona fide*. p. 4.

The defendant, to support this plea in abatement, served a written notice on the plaintiff's attorneys, that, on a day named, he would apply for a commission to examine "Chamblin, Winn, and *Henry Cease, citizens of the county of Mason, State of Illinois.*"

The commission issued under this notice, directs the commissioner to examine these witnesses, and describes them as citizens of Illinois. 19, 20.

In the examination, all these witnesses are interrogated as to the averment in the plea that the transfer was only made to enable the plaintiff to maintain this action in the Federal court.

The deposition of Cease thus opens: "My name is Henry Cease; residence, Mason County, Illinois; age, fifty-two years; occupation, grain dealer and farmer." Like the other witnesses, he testifies to the *bona fides* of the transfer as set up in his amended petition in answer to the plea.

On this showing, we say that it most satisfactorily appeared to the judge of the circuit court that he had jurisdiction of the parties; and in his charge to the jury he fairly

left the inquiry raised by the plea, telling them if they believed the transfer was colorable, to find for defendant. 66.

This appears to us very plain, but if, in the opinion of the Court, we are in error, and there is want of the proper averment which plaintiff in error can now take advantage of, the Court will not, as he requests, reverse the case and order it to be dismissed. On the contrary, the case will be sent down that an amendment may be made showing the citizenship, if it be such as to give the court jurisdiction.

Morgan's Ex'ors vs. *Gay*, 19 Wall., 83.

It is urged by plaintiff in error that the case should be dismissed, on the ground that a new action would be barred by the statute of limitations.

On the contrary, this will afford an additional inducement to the Court to give the party an opportunity to amend.

The only other assignment is as to the plea of the statute of limitations which the Court charged interposed no bar to the plaintiff's recovery.

The note was made October, 1860, and was payable July, 1861. The civil war terminated in August, 1866, as to Texas, by proclamation of the President. The statute of four years relied on expired August, 1870. But before the expiration of this period, the convention of the people of Texas, which met in 1869, by ordinance provided that the statute of limitations should be held to be suspended from January, 1861, till the adoption of the constitution. This adoption took place on 30 March, 1870.

This suit was filed 25 September, 1873, and is within the period prescribed, if we have correctly stated the time for the termination of the war in Texas; and if it was

competent for the convention, before the bar of the statute was complete, to extend the time for bringing suit.

We need not cite the cases which determine that the period during which the war lasted is to be deducted from the running of the statute.

The war commenced in Texas 19 April, 1861, and terminated 20 August, 1866.

The Protector, 12 Wall., 702.

Whatever may be the power of the legislature to remove the bar of the statute when the prescribed period had been completed—a question which we need not discuss—we may safely assert that the power to prolong the time before the bar was complete, has never been doubted.

The mistake into which the plaintiff in error has fallen, is to be found in the instruction asked (p. 72), wherein he assumes that the war ended in Texas on 13 June, 1865. But, it will be remembered, that the proclamation of that date did not include the State of Texas. If that had been the true date, then the serious question would have been presented, Whether it was competent for a convention or legislature to remove the bar of the statute?

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Defendant in Error.